

Bell Atlantic
1300 I Street NW, Suite 400W
Washington, DC 20005

Susanne Guyer
Executive Director,
Federal Regulatory Affairs

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November 5, 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY



Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: **Docket CCB/CPD 97-30 and 96-98, Reciprocal Compensation**

Dear Ms. Salas:

Please place the attached letter to Messrs. Kevin Martin and Paul Misener in the record in the above referenced proceedings.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary.

Sincerely,

A handwritten signature in cursive script, reading "Susanne Guyer".

Attachment

CC: K. Martin
P. Misener

No. of Copies rec'd
List A B C D E

023

Bell Atlantic Network Services, Inc.
1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-2944
(703) 525-6436 - FAX

Michael E. Glover
Associate General Counsel

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EX PARTE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Kevin Martin
Mr. Paul Misener
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Reciprocal Compensation On Internet Traffic (Dkts CCB 97-30 and 96-98)

Dear Mr. Martin and Mr. Misener:

This follows up on two points from our meeting yesterday.

First, the FCC should not preempt the states' ability to reconsider their decisions concerning the applicability of reciprocal compensation to Internet traffic. Rather, the FCC should expressly say that it is not addressing what effect its order has on existing agreements or prior state orders addressing those agreements. State regulatory commissions are in the best position to address those issues. And a number expressly said that they will do so once the FCC releases its order addressing the nature of the traffic (examples are attached).

In contrast, some parties urge the FCC to preempt the ability of state commissions to reconsider their prior orders. It should do so, they say, either directly by requiring them to leave existing arrangements in place, or indirectly by inserting language into the order that effectively dictates to the states the factors to "consider" in re-examining their decisions. ***But preemption by any name is still preemption***, and efforts to foreclose any meaningful role for the states should be rejected.

Second, there is no reason to think the states are not up to the task of interpreting existing agreements. Once the nature of the traffic is clarified, the individual agreements can be interpreted according to basic principles of contract law. The states are at least as well suited for this task as the FCC.

For example, the express terms of Bell Atlantic's agreements say that reciprocal compensation applies only to calls that are local on an end-to-end basis. And the most basic principle of contract law is that contracts must be interpreted based on the express language of the contract itself. *See* Restatement (Second) of Contracts § 203(b) at 93

("Express terms are given greater weight than course of performance, course of dealing, usage of trade...."); *see also United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (the scope of an agreement "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it").

Likewise, despite requests to do so, Bell Atlantic refused to agree that Internet traffic is local or that it is subject to reciprocal compensation. And a closely related principle of contract interpretation is that courts (or agencies) may not read terms into a contract that the parties did not agree to include. *See Coca-Cola Bottling Comp. v. The Coca-Cola Company*, 769 F. Supp. 599, 616-617 (D. Del. 1993) ("Courts do not rewrite contracts to include terms not assented to by the parties."); 17A Am. Jur. 2d Contracts § 340 ("A court may not make a new contract for the parties or rewrite their contract under the guise of construction;" for example, it may not impose on one of the parties terms which it did not voluntarily consent to include).

I would be happy to address any questions you may have.

Sincerely,



Michael E. Glover

Attachment

Examples of State Commissions That Have Said They May
Revisit Their Reciprocal Compensation Decisions

Massachusetts:

“We agree with Bell Atlantic that the FCC has jurisdiction over Internet traffic. Pursuant to that authority, the FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order. See FCC Comments on Request by ALTS for Clarification of the FCC’s Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, and Public Notice, CC Docket 97-30 (rel. July 2, 1988, 12 FCC Rcd 9715) (FCC stated that it has not yet determined whether CLECs are entitled to reciprocal compensation for terminating Internet traffic); see also In the Matter of GTE Telephone Operators [sic], GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79 (rel. August 20, 1998).”

Complaint of WorldCom Technologies, Inc., D.T.E. 97-116 at 5, n.11 (Mass. Dept. of Telecom. and Energy, Oct. 21, 1998) (emphasis added).

Maryland:

“The Commission recognizes that there is a question as to whether these communications are ‘jurisdictionally interstate communications.’ See In the Matter of MTS and WATS Market Structure, 97 F.C.C. 2d 682, paragraphs 82-83 (1983). However, it does not believe that this question affects the result herein because of the Federal Communications Commission’s (‘FCC’) requirement that although ISPs use incumbent LEC facilities to originate and terminate interstate calls, these services should be purchased ‘under the same intrastate tariffs available to end users.’ In the Matter of Access Charge Reform, FCC 92-158, paragraphs 341-342 (1997). Moreover, we note this issue is currently being considered by the FCC and may ultimately be resolved by it. In the Matter of Request by ALTS for Clarification of the Commission’s Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30. In the event the FCC issues a decision that requires revision to the directives announced herein, the Commission expects the parties will so advise it.”

Letter Order by Daniel Gahagan, Executive Secretary, Maryland Public Service Commission, at 1 (Md. PSC Sept. 11, 1997) (emphasis added).

West Virginia:

“Although the Commission agrees that a final determination on this matter rests with the FCC, it is clear that, historically, calls that originate and are terminated to ISPs in local calling areas are treated as local traffic. . . . The fact that the FCC may be reconsidering – and conceivably may abandon – its policy that ISP calls originating within local calling areas should be considered local traffic, does not alter the fact that this is the policy currently in effect.”

“If the FCC should change its position, then the Commission expects interconnection agreements to be applied in accordance with the FCC’s new policy. Moreover, the parties will be directed to bring the FCC’s final determination to the Commission’s attention in order to allow it to consider whether any further action is appropriate.”

MCI Telecommunications Corporation, Case No. 97-1210-T-PC at 29-30 (W.Va. PSC Jan. 13, 1998) (emphasis added).

Ohio:

“We also recognize that the FCC is in the process of considering arguments addressing these broader policy implications. *The FCC’s deliberations could, therefore, have an impact on this Commission’s view of the issues presented by the parties in this complaint. We specifically reserve our rights to consider these policy implications in a future proceeding.*”

Complaint of ICG Telecom Group, Inc., Case No. 97-1557-TP-CSS, at 8 (Pub. Util. Com’n. Ohio, Aug. 27, 1998) (emphasis added).

Michigan:

“Further, Ameritech Michigan’s position depends on a conclusion that calls to ISPs cannot be separated into a local call and a subsequent communication with the information service provider.... As to the meaning of the FCC’s prior rulings and pronouncements, the Commission is not persuaded that the FCC has ruled as Ameritech Michigan asserts. In fact, the FCC’s more recent statements have moved away from the view upon which Ameritech Michigan’s position depends. *When the FCC rules in the pending docket, the Commission can determine what action, if any, is required.*”

In re Brooks Fiber Communications of Michigan, Inc., Case No. U-1178, et al., at 14-15 (Mich. PSC Jan. 28, 1998) (emphasis added).

Illinois:

“If the FCC had concluded that calls to ISPs are interstate in nature and thus that the connections between incumbent LECs and Internet ISPs were interstate in nature, like those between incumbent LECs and IXC’s for purposes of interstate calls, it would have concluded that it has the authority to address those compensation issues.”

* * *

“There is no dispute that the FCC is currently considering various issues regarding internet communications.... The ultimate conclusion, as well as its timing can only be the subject of speculation. *This Commission anticipates that if the FCC institutes a change in policy which impacts the interconnection agreements or any other aspect of state policy, the parties will bring that matter to the Commission’s attention in an appropriate fashion.*”

Teleport Communications Group v. Illinois Bell, Docket No. 97-0404 at 12-13 (Ill. Comm. Com’n., March 11, 1998) (emphasis added).

“After reviewing relevant FCC precedent, this court finds that the FCC has not reached a coherent decision on the issue of the compensation of LECs providing Internet access. This result is due, in part, to the fact that the Internet, as a recently new development to the telecommunications world, presents questions that have not previously been addressed by FCC decisions and policy.... Thus, the precise issue under review in the instant case is currently being decided by the FCC. As of the date of this Memorandum Opinion and Order, the issue has not been resolved. *Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case.*”

* * *

“Second, this court finds that the ICC’s determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech’s argument that federal law requires that this court adopt a ‘jurisdictional’ standard for termination that would be measured on an ‘end-to-end’ basis is not convincing.”

* * *

“Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. *Given the absence of an FCC ruling on the subject*, this court finds it appropriate to defer to the ICC’s finding of industry practice regarding call termination.”

Illinois Bell Tel. Comp. v. Worldcom Technologies, Inc., No. 98 C 1925, Mem. Op. and Order at 17-18, 26-27 (N.D. Ill. July 21, 1998) (citations and footnotes omitted) (emphasis added).

Arizona:

“The Commission will adopt the exemption permitted by the FCC. However, the Agreement should indicate that *if and when the FCC modifies the access charge exemption, the Agreement will also be modified.*”

MFS Communications Comp., Inc., 1996 WL 787940 *5 (Ariz. Corp. Com’n Oct. 29, 1996) (emphasis added).

Delaware:

“*The FCC may someday reach a contradictory conclusion.* However, there is no reason to assume in advance that it will. Moreover, a deferral of authority here appears to leave a substantial gap in the event that there is no FCC determination. In contrast, exercising authority here to adopt the position urged by BA-Del presents no substantial problem *should the FCC decide in the future that it will use federal authority to negate the action taken here.* Thus, there are also substantial practical grounds to favor reaching a decision on this issue in this arbitration, rather than deferring one indefinitely, as BA-Del proposes.”

Petition of MCI, Dkt No. 97-323, Arbitration Award at 14-15 (Del. PSC, Dec. 16, 1997) (emphasis added).

Missouri:

“[T]he Commission has been advised by the parties and takes official notice that, as to the crucial issue in this case, i.e. reciprocal compensation under this type of scenario, the FCC has requested comments and taken the matter under advisement in Docket No. 97-30. The record presented by the parties is not sufficiently persuasive to move this Commission to make a final decision on the reciprocal compensation issue in light of the FCC’s pending proceeding on the same issue.”

* * *

“[P]rior to a decision from the Federal Communications Commission on the issue of reciprocal compensation for traffic to ISPs within a local calling scope, the parties shall compensate one another for such traffic in the same manner that local calls to non-ISP end users are compensated, *subject to a true-up following the Federal Communication Commission’s determination on the issue.*”

In re Birch Telecom of Missouri, Inc., 1998 WL 324141 *3, *5 (Mo. PSC Apr. 24, 1998) (emphasis added).

North Carolina:

“The FCC has not squarely addressed this issue, although it may do so in the future. While both parties presented extensive exegeses on the obscurities of FCC rulings bearing on ISPs, there is nothing dispositive in the FCC rulings thus far.”

In re Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, LLC, Dkt No. P-55, SUB 1027 at 7 (N.C. PUC Feb. 26, 1998) (emphasis added).

Florida:

“The FCC has not yet decided whether ISP traffic is subject to reciprocal compensation. While the FCC has determined that ISPs provide interstate services, it appears that the FCC may consider those services severable from telecommunications services, as we explain below. No FCC order delineates exactly for what purposes the FCC intends ISP traffic to be considered local. By the same token, the FCC has not said that ISP traffic cannot be considered local for all regulatory purposes. It appears that the FCC has largely been silent on the issue. This leads us to believe the FCC intended for the states to exercise jurisdiction over the local service aspects of ISP traffic, unless and until the FCC decided otherwise.”

Complaint of WorldCom Technologies, Inc., Dkt No. 971478-TP, Order No. PSC-98-1216-FOF-TP at 8-9 (Florida P.S.C., Sept. 15, 1998) (emphasis added).

November 4, 1998